

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

E05-219

June 21, 2006

ROBERT GOSNELL d/b/a QUALITY
COMMUNICATIONS

APPELLANT

V.

DIRECTOR ET AL.

APPELLEES

APPEAL FROM THE ARKANSAS
BOARD OF REVIEW
[2002-BR-00001 EC]

AFFIRMED

Appellant, Robert Gosnell, d/b/a Quality Communications (Qual Com), appeals the decision of the Board of Review that his business is not exempt from paying unemployment insurance taxes on cable splicers because it does not meet all three of the criteria set forth in Arkansas Code Annotated section 11-10-210(e) for determining whether persons are employees or independent contractors. On appeal, Qual Com argues that it meets all three of the criteria set forth in section 11-10-210(e), and that the cable splicers are not paid wages within the meaning of sections 11-10-210(e) and 11-10-215(a), and therefore Qual Com should be exempt from paying unemployment taxes. We affirm the decision of the Board of Review.

Arkansas Code Annotated section 11-10-210(e) (Supp. 2003) provides:

(e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that:

(1) Such individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and

(2) The service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

“Wages” is defined as “all remuneration paid for personal services, including, but not limited to, commissions, bonuses, cash value of all remuneration paid in any medium other than cash.” Ark. Code Ann. § 11-10-215(a) (Supp. 2003).

In *American Transportation Corporation v. Director*, 39 Ark. App. 104, 106, 840 S.W.2d 198, 199 (1992) (citations omitted), our court held:

In order to obtain the exemption contained in the Act, it is necessary that the employer show to the satisfaction of the Director that the requirements of all three subsections have been met. Therefore, if there is sufficient evidence to support a finding that any one of the three requirements were not met, the case must be affirmed. In reviewing decisions of the Board of Review, this court views the evidence in the light most favorable to the Board's findings, giving them the benefit of every legitimate inference that can be drawn from the testimony, and will affirm the determination of the Board if its findings are supported by substantial evidence. The issue to determine is not whether the evidence would support some different finding, but whether it supports the finding actually reached by the Board.

In the present case, Everett McDougal testified that he worked with Qual Com for six to eight months in 2001 performing cable splicing. He said that he signed an independent-contractor agreement when he worked for Qual Com, and that Qual Com sent him a 1099 for the year. McDougal stated that sometimes he was paid by the unit and sometimes he was paid by the hour; it depended upon the manner in which the telephone company paid Qual Com. McDougal testified that he worked on different jobs each week for Qual Com; that he would get a blueprint of the work to be done, complete

the job, and return the print to Qual Com; and that inspectors from the telephone company would inspect his work. McDougal said that he was not required to take any of the jobs offered to him by Qual Com, but that he did not refuse a job they offered. He stated that the only time Gosnell would pull him off a job and send him to another job was when there was an emergency, such as a cable being cut.

McDougal testified that he furnished all of his own tools, his own transportation, and any travel expenses associated with the job, such as meals and lodging. He said that he always stayed away from home during the week and came home on weekends while he was working for Qual Com. McDougal stated that if his truck broke down, he was responsible for fixing it, not Qual Com. He said that he was free to set his own hours on each job, and that his agreement did not limit him to work exclusively for Qual Com.

McDougal explained that he had a list of different companies that hired splicers, and that he would just call until he found work. He said that he never contracted directly with the telephone companies, explaining that the telephone companies contracted with large businesses, not individual splicers.

McDougal also explained that when he left Qual Com in 2001, he filed a claim for unemployment insurance on MSG, a company out of Texas, because when he worked there he was paid hourly and taxes were withheld from his pay. He admitted that he was sometimes paid hourly by Qual Com, and that he was paid every week.

Robert Gosnell, owner of Qual Com, testified that he was in the contract-telephone-cable-splicing business. He stated that when he contracted with a telephone company or other contractor, there was no requirement that he perform the work himself;

he was free to “sub out” the work to subcontractors. He said that his contracts, including the one entered into between Qual Com and Everett McDougal, did not require that the subcontractor personally perform the work; the subcontractors were free to also contract out the work if they chose to do so. Gosnell said that he did not care who performed the work as long as the job got done.

Gosnell testified that he did not set the contractors’ hours or break times; did not require a dress code; did not perform background checks; and did not require drug testing or physicals. He stated that he did not provide health insurance, vacation, life insurance, retirement benefits, or sick days. He said that the subcontractors provided their own tools and equipment; their own transportation; their own overnight accommodations; and their own meals. Gosnell indicated that the subcontractors were free to work for other people while they were working for Qual Com.

Gosnell testified that if there was a problem with any of the subcontractors’ work, they would handle that on their own and have to “eat those costs.” He said that he carried a back-up liability insurance policy for added security even though the subcontractors had general liability policies and workers’ compensation. Gosnell admitted that if a splicer left a jobsite incomplete that he was ultimately responsible for finishing the job, but he said that had never happened. He stated that he once had occasion to stop using a splicer for a reason other than a lack of available work, and that he stopped using that splicer because he was a liar and did not know how to perform work that he said he knew how to do.

The Employment Security Department also had both McDougal and Qual Com complete independent contractor surveys. The Qual Com representative indicated that the worker was required to follow a routine or schedule because each job had a due date. When asked whether the worker would perform the services personally, Qual Com checked “yes.” Qual Com also checked “yes” to the questions of whether the worker was required to adhere to prices, terms, and conditions of sale established by the firm and whether orders were submitted to and subject to approval by the firm. Qual Com indicated that the services would be performed at a specific jobsite, and that the worker would receive both an hourly wage and piecework pay. Qual Com further indicated that it carried workers’ compensation insurance.

The Board of Review found that Qual Com paid wages to McDougal and that Qual Com had failed to meet any of the three criteria for exemption from payment of unemployment taxes. We hold that both of these questions -- whether Qual Com paid wages and whether the second prong of the independent-contractor unemployment-tax exemption, which is if the service was performed either outside the usual course of the business for which the service is performed or was performed outside of all the places of business of the enterprise for which the service is performed -- are answered by *Home Care Professionals of Arkansas, Inc. v. Director*, ____ Ark. App. ____, ____ S.W.3d ____ (May 10, 2006). In that case, this court held that wages were paid, that the appellant had failed to satisfy subparagraph two of the statutory exemption, and that appellant therefore was not exempt from paying unemployment taxes.

In *Home Care, supra*, the appellant, HCP, maintained a list of caregivers who were able to provide home-care services for the elderly. At its inception, HCP provided direct home-care services for the elderly, but over the years it had evolved into a home-care referral service. Clients contacted HCP and set forth what type of home-care services were needed; HCP collected a fee for the service up front and then found a caregiver willing to perform the necessary services. The client and caregiver negotiated a schedule and the terms of employment; once the caregiver completed the services and turned in a time sheet, HCP distributed the funds collected from the client less its forty percent referral fee. Caregivers on HCP's referral list signed independent-contractor agreements with HCP, and each caregiver was responsible for his/her own transportation and supplies. After a schedule was designed by the client and the caregiver, HCP administered the schedule, to include scheduling a replacement if the caregiver was unable to work. HCP's caregivers were not required to be exclusively listed with HCP.

In finding that HCP paid wages to the caregivers, the Board of Review stated that the caregivers were paid by HCP commensurate with the extent of services and hours of care provided to HCP's clients; therefore, that qualified as wages. That situation is analogous to the case at bar, in which Qual Com paid the splicers either commensurate with the amount of hours each splicer worked or the number of units completed by each splicer. While Qual Com argues that it did not pay wages because the splicers could "sub out" the work, McDougal testified that he did not sub out the work. We find no meaningful difference in how HCP paid its caregivers and how Qual Com paid its

splicers, and we cannot say that the Board's decision that the remunerations constituted wages was not supported by substantial evidence.

In *Home Care, supra*, finding that HCP had failed to meet the second prong of the three-prong test for independent-contractor status, this court quoted the Board's analysis of whether the caregivers performed services outside all of the places of business of the enterprise for which the services were performed. The Board, citing authority from other jurisdictions, stated that "an employer's place of business had been found to include not only the location of a business's office, but also the entire area in which a business conducts business." The Board also found that "the representation of an entity's interest by an individual on a premises renders the premises a place of the employer's business." The Board determined, and this court adopted its determination, that the caregivers represented HCP's interest on the clients' premises, thereby making the clients' premises a place of business.

As stated above, we find the holding in *Home Care* to be analogous to the present case. Here, McDougal was representing Qual Com's interests on the jobsites where he performed telephone-cable splicing, therefore making each jobsite a place of Qual Com's business. Because Qual Com did not meet the second prong of the independent-contractor exemption, it is not necessary to discuss whether or not it met the first or third prongs of the test. Based upon our court's holding in *Home Care*, we affirm the Board of Review's decision that Qual Com is not exempt from paying unemployment taxes.

Affirmed.

NEAL and ROAF, JJ., agree.